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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 526

CHARLES SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 51-55) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1954 (R. 56). The petition for a writ of certiorari was filed on January 10, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied the right under Section 1624.2(b) of the selective service regula-

tions to discuss his draft classification at his personal appearance before the local board.

2. Whether there was a basis in fact for petitioner's I-A-O (noncombatant military service) classification.

3. Whether petitioner was denied a fair hearing before the hearing officer on his conscientious objector claim in that he was not given a full summary of any adverse evidence in the F.B.I. report.

4. Whether, at petitioner's trial for refusing induction into the armed forces, the court properly refused to admit in evidence the F.B.I. report, which petitioner sought in order to determine whether the hearing officer had given him a full summary of any adverse information.

STATUTES AND REGULATIONS INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6(j) [50 U.S.C. App. 456(j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, socio-

logical, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, rec-

ommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12(a) [50 U.S.C. App. 462(a):

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of com-

petent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System:

32 C.F.R. 1622.11:

Class I-A-O—*Conscientious Objector Available for non-combatant military service only.* (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

32 C.F.R. 1622.14:

Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* —(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

Appearance before local board. * * *

32 C.F.R. 1624.2:

(b) At any such appearance, the registrant may discuss his classification, may point out

the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California for refusal to obey an order for induction into the armed forces of the United States in violation of 50 U.S.C. App. 462(a). He was sentenced to four years' imprisonment. (R. 3-5.) On appeal (R. 6-7), the judgment was unanimously affirmed (R. 56).

Pertinent facts from petitioner's selective service file, which was introduced in evidence as Government Exhibit 1 (R. 9-10), are as follows:

In his classification questionnaire received by his local board on September 25, 1950, petitioner

stated that he was born on August 16, 1931; that he was a minister of Jehovah's Witnesses, but did not regularly serve as such; that he was a student at Compton Junior College; and that he was conscientiously opposed to participation in war in any form (S.R. 4, 6, 7, 10).[1] In a letter dated September 22, 1950, to the local board, requesting SSS Form 150 for conscientious objectors, petitioner gave quotations from the Bible, mentioned that he was not trying to dodge the Selective Service Act since he was consecrated in his beliefs long before the draft became effective, and objected to "combatant and non-combatant service, for my service is pledged to God" (S.R. 12-14).

In his SSS Form 150, received by the local board on October 10, 1950, petitioner set out numerous Bible quotations and stated, "That participating in any of the armed forces activities makes me a friend of this world, and not of God. Therefore I choose to be a friend of God rather than a friend of this world." He stated that his beliefs were deep-seated and involved duties to God that were higher than those which he owed to the state. (S.R. 20.) In answer to the question as to the circumstances under which he believed in the use of force, he answered, "Absolutely none without Jehovah God's sanction" (S.R. 19).

After being classified I-A (available for military service) on October 26, 1950, petitioner protested this classification and his request for a personal

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[1] "S. R." refers to the longhand numbers at the bottom of the pages in Gov. Ex. 1.

appearance before the local board was granted (S.R. 11, 31, 35). The board's summary of petitioner's appearance on December 13, 1950, was as follows (S.R. 36):

> When asked if he had any new information to submit, he presented the board with a letter. He stated that he is not willing to go in the Armed Services as it is against his belief. No other questions was (sic) asked of this registrant and it was the unanimous opinion of the members of this local board that he should be continued in Class I-A.

In the letter referred to (S.R. 37-38) petitioner listed numerous quotations from the Bible as the basis for his beliefs.

On December 19, 1950, petitioner wrote his local board, expressing dissatisfaction with the I-A classification and asking that his file be sent to the appeal board for his classification as a conscientious objector, opposed to both combatant and noncombatant service (S.R. 40). On April 19, 1951, the appeal board reviewed the file and determined that petitioner was not entitled to a classification in either class IV-E or in a class lower than IV-E [later I-O] (conscientious objector); the file was thereafter forwarded to the Department of Justice for an advisory recommendation (S.R. 11, 49). In the hearing officer's report dated March 11, 1952, reference was made to the fact that petitioner "works on Sundays when necessary;" that peti-

tioner "feels he has a right under the Scriptures to protect his mother or brother whenever necessary and that he would be forgiven by God"; and that petitioner brought to the hearing another Jehovah's Witness who stated that he knew that petitioner "believes in God's law as being superior to man's law." The hearing officer, after considering all the testimony, concluded that petitioner should be classified I-A-O (available for noncombatant service) (S.R. 51-54). The Special Assistant to the Attorney General in Washington on April 24, 1952, concurred in this recommendation by the hearing officer and forwarded the latter's report to the appeal board (S.R. 50). On April 30, 1952, the appeal board by a vote of 3 to 0 classified petitioner I-A-O (S.R. 39).

Petitioner was ordered to report for induction on July 31, 1952, but after reporting he refused to be inducted (S.R. 11, 58, 60-62).

At the trial petitioner gave his version as to what occurred on December 13, 1950, when he made his personal appearance before the local board. He stated that he tried to inform the board of the verse from James 4:4 to show why he objected to fighting in war and killing, but that he was cut short (R. 13, 14). He testified, "* * * I proceeded to open the Bible to give [the board] evidence as to why I could not participate in war, and when one of the members saw me opening the Bible he stated that it was not necessary for me to use the Bible, because they were not interested in what I believed, but how sincere I was in what I believed" (R. 21). After

a few questions were asked, the board inquired if petitioner had any new information, and he then presented his letter of December 13, 1950 (S.R. 37-38). When asked if he had any other new information, petitioner told the board that he had none. (R. 22, 29.) After petitioner stated (R. 22) that he cited James 4:4 in his letter the following colloquy occurred:

> The Court: And you gave all the other Scriptural citations you wished to give there?
>
> [Petitioner]: Yes, as I felt that they would need, but if they presented any further question concerning what I believed, I was ready and willing to answer anything that they might want to know. [R. 23.]
>
> * * * * *
>
> The Court: I say, did you have in mind to offer any additional Scriptural references and other information not then included in your file or in the letter which you then presented to them?
>
> [Petitioner]: No, I don't believe so. All the Scriptures that were covering this subject were stated in the letters to them. What I tried to do was to impress on their minds the importance of these Scriptures, in the event that they may have overlooked the importance or misunderstood what my feelings were. [R. 25.]

There was admitted in evidence Defendant's [Petitioner's] Exhibit A, a letter dated February 20, 1952, from the hearing officer to petitioner reading as follows (R. 26-27):

> Receipt is hereby acknowledged of your letter of Feb. 15, 1952, in which you ask to be advised as to information or evidence that you should produce. By these presents, I inform you that at the time you present yourself for the hearing, I will inform you and if you have not what you feel is necessary to substantiate your claim, I will give you a postponement.

Petitioner testified that this communication was in reply to a letter which he wrote to the hearing officer requesting that any adverse information in his file be made available so he could prepare his defense (R. 26). Petitioner's testimony was that at the hearing the hearing officer did not advise of any adverse information in the file, and that petitioner did not ask him for any such information (R. 27, 30). Petitioner admitted that he did not ask the hearing officer anything about any type of information which the officer stated he would not give to petitioner (R. 30).

Petitioner requested that the F.B.I. report be admitted in evidence and that he be permitted to inspect it. The Government objected on the ground that the report was a privileged document under Attorney General's Order 3229. (R. 33.) After making an *in camera* inspection of the report the

court ruled that while it was technically relevant to the issue of whether or not the hearing officer complied with petitioner's request for any adverse information, its materiality was slight and its evidentiary value to the defense was "outweighed by the public interest in the preservation of the confidential character of executive communications designated as 'confidential' by the executive, pursuant to regulations issued under Section 22 of Title 5 of the United States Code." Accordingly the court denied the motion to inspect, refused to admit the report in evidence, and ordered it sealed for *in camera* inspection by the appellate court. (R. 36-39.) The court observed that the hearing officer's report contained only one statement that could be considered adverse—"He [petitioner] works on Sundays when necessary" (R. 36).

ARGUMENT

1. Petitioner complains that he was denied procedural due process of law guaranteed by 32 C.F.R. 1624.2(b) [*supra*, pp. 5-6], in that he was not accorded the right during his personal appearance before the local board to argue and discuss his classification (Pet. 2, 12). As the court below noted (Pet. 18-19), the record refutes this contention.

When asked by the board if he had any new information, petitioner was permitted to present his lengthy letter (S.R. 37-38), which elaborated upon his religious views and was in substantial effect a discussion of his reasons for granting the I-O classification he sought. Petitioner admitted that

he had no other new information and that he had given in his letter all the scriptural quotations needed. He testified that if board members "presented any further question concerning what [he] believed, [he] was ready and willing to answer anything that they might want to know" (R. 23). Petitioner did not, however, show that the board had additional questions necessitating further discussion. The board's refusal to listen to a lengthy dissertation on Bible citations, expatiating upon information already in petitioner's file, was entirely reasonable and proper. Cf. *Martin* v. *United States*, 190 F. 2d 775, 778-779 (C.A. 4), certiorari denied, 342 U.S. 872; *Tomlinson* v. *United States*, 216 F. 2d 12, 15 (C.A. 9), petition for certiorari pending, No. 391, O.T. 1954. Under the regulation the information furnished was required to be as "concise as possible under the circumstances" and the board was empowered to "impose such limitations upon the time which the registrant may have for his appearance as they deem necessary." Since petitioner had an opportunity fully to present the facts he deemed relevant, he was given the procedural rights conferred by the regulations. [2]

2. Petitioner contends that since he asserted he

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[2] *United States* v. *Stiles*, 169 F. 2d 455 (C.A. 3); *Davis* v. *United States*, 199 F. 2d 689 (C.A. 6); and *Bejelis* v. *United States*, 206 F. 2d 354 (C.A. 6) [Pet. 12] differ in their essential facts from the situation here. The instant case is not one where the local board substantially foreclosed the registrant from presenting any argument in behalf of his asserted classification. Neither is it one where the local board failed to reclassify the registrant after his personal appearance, since immediately thereafter the board decided that petitioner "should be continued in Class I-A" (S.R. 36).

was entitled to a I-O (conscientious objector) classification it was error for the appeal board to give him only a portion of his claim by classifying him I-A-O, that is, available for noncombatant service. (Pet. 2, 11). The appeal board was, however, under no compulsion to grant a I-O classification merely upon petitioner's assertion of a claim to such exemption. The board had power to consider the nature of petitioner's claim as disclosed in his statements regarding his beliefs and to evaluate the recommendation of the hearing officer, who had observed first hand the demeanor and manner of petitioner.

As for the basis in fact for the I-A-O classification the case is, as the Court of Appeals noted (Pet. 17-18), substantially the same as *Tomlinson* v. *United States*, No. 391, O.T. 1954, in which a petition for a writ of certiorari is pending. The government's memorandum in response to that petition suggested that action thereon await decisions in *Simmons*, No. 251; *Gonzales*, No. 69; *Witmer*, No. 164 and *Sicurella*, No. 250. Petitioner's objections to service were, according to his own statements, based upon his unwillingness to submit to any governmental authority. As discussed in the government's brief in the *Sicurella* case, No. 250, this Term, that is not the type of opposition to service for which the statute grants exemption.

3. Petitioner contends that he was denied a fair hearing before the hearing officer since he was not given a full summary of any adverse evidence which may have been in his F.B.I. investigative report

(Pet. 2, 12). As the court below points out, however (Pet. 20), it is apparent from the hearing officer's report that the recommendation was not based on any adverse information in the F.B.I. report, but was based upon petitioner's own statements of his beliefs. It seems evident that the hearing officer did not give petitioner a summary of adverse information at the hearing, as he agreed to do in the letter market Exhibit A, because he was not relying upon adverse information. On petitioner's own statements, the I-A-O classification was justified.

4. Petitioner's final contention is that he was denied due process of law by reason of the court's exclusion at the trial of the F.B.I. report which he sought for the purpose of determining whether the hearing officer had given him a full summary of any adverse evidence in the report (Pet. 3, 13). This question is discussed in the government's brief in *Simmons,* No. 251, pp. 39-49. The decision in that case may make it unnecessary to give it further consideration in this one.

CONCLUSION

For the reasons stated it is respectfully submitted that the Court should defer action on this case until the disposition of the cases raising similar issues now before the Court.

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